CA No. 08-30385

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

PLAINTIFF-APPELLEE,

v.

JUAN PINEDA-MORENO,

DEFENDANT-APPELLANT.

UPON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON
THE HONORABLE OWEN M. PANNER, SR. U.S. DISTRICT JUDGE
07-CR-30036-PA

SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLEE ON REMAND FROM THE UNITED STATES SUPREME COURT

S. AMANDA MARSHALL
UNITED STATES ATTORNEY
DISTRICT OF OREGON
KELLY ZUSMAN
APPELLATE CHIEF
DISTRICT OF OREGON
AMY E. POTTER
ASSISTANT UNITED STATES ATTORNEY
405 E. 8TH AVE, SUITE 2400
EUGENE, OR 97401
TELEPHONE: (541) 465-6771

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INTRODUCTION AND STATUS OF THE CASE

When this Court affirmed the district court's decision denying defendant's motion to suppress data obtained through the use of GPS trackers, it reached the right result for what is now – in light of *United States v. Jones*, 132 S. Ct. 945 (2012) – the wrong reason. When this Court originally decided this case, it relied largely on *United States v. McIver*, 186 F.3d 1119 (9th Cir. 1999). *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010). The Supreme Court's decision in *Jones* overruled the Fourth Amendment analysis in *McIver*. Under *Jones*, a trespassory installation of a GPS device to monitor a car's movements constitutes a search under the Fourth Amendment. 132 S. Ct. at 949.

The central question that remains following *Jones* is the appropriate remedy. Because the agents in this case relied in good faith on this Circuit's precedent in *McIver*, another Supreme Court case controls the outcome: *Davis v. United States*, 131 S. Ct. 2419 (2011). In *Davis*, the Court held that suppression was an unwarranted sanction given the officer's good faith reliance upon Circuit precedent. The same result controls here. Alternatively, the use of GPS tracking devices is such a limited intrusion that it should require only reasonable suspicion, and the officers reasonably suspected that defendant's car was involved in illegal activity before they installed the GPS devices.

SUMMARY OF FACTS

In May 2007, a DEA agent noticed a group of men purchasing a large amount of fertilizer – the type frequently used by marijuana growers in the local area. *Pineda-Moreno*, 591 F.3d at 1213. The men drove a 1997 Jeep registered to defendant. *Id.* Shortly thereafter, employees at several stores in the local area reported to DEA that defendant and others were purchasing deer repellant and irrigation equipment (ER 12; GER 16-18).[1] The DEA suspected that defendant and others were growing marijuana in remote locations in Southern Oregon.

DEA agents then attached mobile tracking devices to the underside of defendant's car. *Pineda-Moreno*, 591 F.3d at 1213. On four of these occasions, defendant's car was on a public street in front of his residence; one time in a public parking lot; and twice on the driveway, in front of the carport, next to defendant's mobile home (GER 98-108). The driveway was approximately five feet from the south-side of defendant's home (GER 104). The driveway was completely open to public access, and there were no fences, gates, or "no trespassing" signs anywhere on or near it (GER 105). In total, there were seven

[1] ER refers to the Excerpts of Record filed with defendant's opening brief. GER refers to the Government's Excerpts of Record filed with the government's answering brief. CR refers to the Clerk's Record.

tracking devices used intermittently from approximately June/July 2007 - September 2007. (ER 4-5; GER 99-108).[2]

Using the tracking devices, law enforcement officers were able to discern the car's movements via computer program (GER 41-42). The mobile trackers revealed that defendant's car drove to suspected large marijuana grow sites on several occasions. (GER 21-23). Based on this and other information, defendant was arrested. Following his arrest, defendant consented to the search of his home where agents found marijuana. (GER 29-32, 70, 72, 74-75).

Defendant moved to suppress claiming that the government's installation of an electronic tracking device on the undercarriage of his car violated the Fourth Amendment (CR 52). The district court denied the motion, finding that the officers had reasonable suspicion prior to placing the trackers on defendant's vehicle, and under the facts of the case, defendant's Fourth Amendment rights were not violated. (ER 9). Thereafter, defendant pled guilty to count one of the indictment. On direct appeal, this Court affirmed, reasoning that the installation and use of the mobile tracking devices did not constitute a search, and thus, these activities did not violate the Fourth Amendment. *Pineda-Moreno*, 591 F.3d at

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[2] The record does not include specific information about the total number of days that defendant's car was actually monitored during this time frame.

1214-16. The Supreme Court rejected this rationale in *Jones* and remanded this case for further consideration in light of *Jones*. 132 S. Ct. 1533.

ARGUMENT

1. Officers Properly Relied On *McIver* When Installing the GPS Device and Thus, Under *Davis*, Suppression is an Inappropriate Remedy.

When law enforcement officers conduct a search in objectively reasonable reliance on binding appellate precedent that is later overruled, the exclusionary rule does not apply. *Davis v. United States*, 131 S. Ct. 2419, 2423-24 (2011): "Because suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, we hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." In *Davis*, the district court denied a motion to suppress based on existing Eleventh Circuit precedent regarding automobiles searched incident to arrest. *Id.* at 2426. While defendant's appeal was pending, the Supreme Court decided *Arizona v. Gant*, which overturned existing circuit precedent on searches incident to arrest. *Id.*

The fact that the Supreme Court overruled circuit precedent governing automobile searches incident to arrest did not mean that Davis was entitled to suppression. The Court reasoned that "when binding appellate precedent

specifically authorizes a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities." *Davis*, 131 S. Ct. at 2429. The exclusionary rule did not apply because the "sole purpose of the exclusionary rule is to deter misconduct by law enforcement." *Id.* at 2432. Because the officers did not engage in misconduct and were following binding precedent, the good faith doctrine applied and defendant's motion to suppress was properly denied. *Id.* at 2434.

The facts in this case mirror those in *Davis* and the same reasoning applies – the district court's decision should be affirmed because the officers were acting in reliance on existing precedent when they installed and monitored the GPS trackers.[3] In 2007, when the officers installed and monitored the GPS device on defendant's car, established precedent permitted the installation and use of "slap-on" GPS devices without a warrant, probable cause or even reasonable suspicion. *See United States v. Knotts*, 460 U.S. 276 (1983); *United States v. McIver*, 186

[3] The good faith exception was not raised before or addressed by the district court because binding Circuit law controlled. The question of good faith, however, is reviewed *de novo*, *see United States v. Krupa*, 658 F.3d 1174 (9th Cir. 2011), and in this instance, is based purely on the issue of whether the objectively reasonable officers' actions were justified by then-controlling law. As in *Davis*, the Supreme Court's decision in *Jones* was handed down after defendant appealed. Because there is no factual issue underlying application of the good faith doctrine, this Court may decide the question now, as a matter of law.

F.3d 1119, 1127 (9th Cir. 1999). In *United States v. Knotts*, 460 U.S. 276 (1983), the Supreme Court held that the use of an electronic beeper to track a vehicle on public streets "was neither a 'search' nor a 'seizure' within the contemplation of the Fourth Amendment." *Id.* at 285. Although *Knotts* did not specifically address the constitutionality of surreptitiously attaching a tracking device to a vehicle itself,[4] several courts of appeals relied on *Knotts* to hold that the installation and monitoring of a tracking device on a vehicle is not a "search" or "seizure" subject to the Fourth Amendment's warrant requirement. *See, e.g.*, *United States v. Garcia*, 474 F.3d 994, 996 (7th Cir. 2007); *McIver*, 186 F.3d at 1127. Moreover, this Circuit had held that the Fourth Amendment permitted officers to enter a driveway to install a GPS device, specifically rejecting the theory that such a trespass violated the constitution. *McIver*, 186 F.3d at 1126. Indeed, this Court affirmed the actions of officers in this case on direct appeal, relying on *Knotts* and *McIver*. *See Pineda-Moreno*, 591 F.3d 1212.

Thus, regardless of whether the use of the GPS tracking device in this case violated the Fourth Amendment, the exclusionary rule should not apply because agents relied in good faith on the existing precedents – the same precedents relied

[4] The device used in *Knotts* was placed in a chemical drum with the permission of the drum's vendor, which was then sold to the defendant and loaded into his vehicle. 460 U.S. at 278.

on by this Court to uphold their actions prior to *Jones*. *See Davis*, 131 S.Ct. at 2431 ("But exclusion of evidence does not automatically follow from the fact that a Fourth Amendment violation occurred. The remedy is subject to exceptions and applies only where its 'purpose is effectively advanced.'") (internal citations omitted)); *Illinois v. Gates*, 462 U.S. 213, 233 (1983) ("The question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.") The purpose of the exclusionary rule is to deter future Fourth Amendment violations, not remedy past ones. *Davis*, 131 S. Ct. at 2426.

Application of the good faith doctrine fits this situation perfectly. The agents in this case relied upon *Knotts* and *McIver* when they installed the GPS devices and monitored defendant's car. They did not seek a warrant because they had no reason to do so, and this Court's initial decision confirming those actions proves the reasonableness of the agents' assessment of the legal landscape. This forecloses suppression. *Id.* at 2428 ("Under our exclusionary-rule precedents, this acknowledged absence of police culpability dooms [defendant's] claim."). The

district court's decision denying suppression should be affirmed based upon *Davis* and the good faith doctrine.[5]

2. The Minimal Intrusion Implicated By Use of GPS Device Supports Application of a Reasonable Suspicion Standard.

In the alternative, suppression is unwarranted because the DEA agents reasonably suspected that defendant's car was involved in drug activity when they installed the tracking devices. In *United States v. Jones*, 132 S. Ct. 945, the Court held "that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search'" within the meaning of the Fourth Amendment. *Id.* at 949 (footnote omitted). Because the government installed a GPS tracking device without a valid warrant, and then monitored the car's location for 28 days, the Court affirmed suppression of evidence obtained as a result of the GPS-derived data. The Court declined to reach the issue of whether the search was lawful under the Fourth Amendment

[5] Two district courts have denied motions to suppress data from GPS devices installed without a warrant prior to *Jones* based on *Davis*. *See United States v. Leon*, No. CR 09-00452-JMS, __ F. Supp. 2d __, 2012 WL 1081962 (D. Haw. March 28, 2012) (denying motion to suppress because the agents reasonably relied on binding precedent – *Knotts* and *McIver* – in installing and monitoring a "slap-on" GPS tracking device prior to *Jones*); *United States v. Amaya*, No. CR 11-4065-MWB, __ F. Supp. 2d __, 2012 WL 1188456 (N.D. Iowa April 10, 2012) (concluding that *Davis* precluded suppression of data from GPS devices installed and monitored for five months in good-faith reliance on binding Eighth Circuit precedent prior *Jones*).

based on the officers' reasonable suspicion that defendant was involved in drug activity because it had not been raised before the Court of Appeals. Thus, the issue of whether this type of search – the installation and monitoring of a GPS device – requires a warrant, probable cause, or something less remains an open question. *See Id.* at 954.[6]

Installation and use of a slap-on GPS tracking device is such a limited intrusion that it should be justified based upon reasonable suspicion. It is well established that not every search or seizure requires a warrant or probable cause; to the contrary, the general test is one of reasonableness. The Supreme Court "examine[s] the totality of the circumstances" to determine whether a search or seizure is reasonable under the Fourth Amendment. *Samson v. California*, 547 U.S. 843, 848 (2006) (internal quotation marks and citation omitted). Reasonableness of a search or seizure is determined "by assessing, on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.*; *see Wyoming v. Houghton*, 526 U.S. 295, 300 (1999).

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[6] *But see Jones* at 964 (Alito, J., concurring) ("where uncertainty exists with respect to whether a certain period of GPS surveillance is long enough to constitute a Fourth Amendment search, the police may always seek a warrant").

Since *Terry v. Ohio*, 392 U.S. 1 (1968), the Court has identified various law enforcement actions that qualify as Fourth Amendment searches or seizures, but that may nevertheless be conducted without a warrant based upon reasonable suspicion. *See, e.g.*, *United States v. Knights*, 534 U.S. 112, 118-21 (2001) (upholding search of probationer's home based on reasonable suspicion); *Maryland v. Buie*, 494 U.S. 325, 334 (1990) (upholding officers' limited protective sweep in conjunction with in-home arrest based on reasonable belief that area may harbor individuals posing danger); *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985) (upholding search of public school student based on reasonable suspicion); *United States v. Place*, 462 U.S. 696, 706 (1983) (upholding seizure of traveler's luggage on reasonable suspicion that it contains narcotics).

Although the context of these cases is distinguishable, the rationale supports the conclusion that the use of a slap-on GPS device on a car should be permitted based on reasonable suspicion.[7] First, courts have recognized that there is a

[7] The "slap-on" type of device used in this case (and *Jones*) can be distinguished from devices that are hardwired into the car's operating system. Installation of hardwired devices typically involves moving the car to a separate location or making sure the vehicle is in a hidden location, opening the hood and placing a device in the engine compartment. Because of the intrusive nature of the installation, warrants are typically needed for hardwired tracking devices.

diminished expectation of privacy in one's car. *See United States v. Chadwick*, 433 U.S. 1, 12 (1977); *see also Cardwell v. Lewis*, 417 U.S. 583, 590 (1974); *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976). Second, GPS monitoring reveals only the movement of the car on public roadways; it says nothing about what the occupants are doing in the car, and it does not reveal what takes place when the driver arrives at his destination. Indeed, GPS monitoring reveals far less information than what could be lawfully gathered by agents through sustained visual surveillance. Finally, the placement of a GPS device does not interfere with the car's operation in any way. A reasonable suspicion standard appropriately limits law enforcement's use of the devices when considered in light of the limited intrusion and privacy interest at issue.

Prior to the Court's decision in *Jones*, two circuits concluded that installation of a tracking device required only reasonable suspicion. *See United States v. Marquez*, 605 F.3d 604, 610 (8th Cir. 2010) (holding that when officer had reasonable suspicion warrant was not required to install non-invasive GPS device); *United States v. Michael*, 645 F.2d 252, 256-57 (5th Cir. 1981) (en banc) (assuming that installation of a beeper to a van was a search, reasonable suspicion supported the warrantless installation).

Reasonable suspicion is an appropriate standard for use of GPS trackers on automobiles. Obtaining a warrant would provide judicial oversight, but it would do so at great expense to law enforcement investigations. Information gathered from GPS devices is often relied upon by investigators to develop probable cause to then obtain search warrants for cars and residences. Requiring a warrant and probable cause would seriously impede the government's ability to investigate drug trafficking, terrorism, and other crimes. GPS trackers are also a preliminary investigative tool considered and often used by law enforcement prior to applying for a wiretap.

In this case, the DEA had reasonable suspicion that defendant and others were growing marijuana when it used a GPS devices on defendant's car to monitor the car's movements as part of an ongoing investigation of potential drug activity. As the district court correctly concluded, *see* ER 9, the GPS devices were installed after the officers developed reasonable suspicion that defendant and others were involved in illegal activity. An officer has reasonable suspicion when the totality of the circumstances provide a particularized and objective basis for suspicion of wrongdoing. *United States v. Arvizu*, 534 U.S. 266, 273 (2002) ("'[T]he Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity 'may be afoot.'" (citation omitted)). The location

of the events may be significant, as is the agent's training and experience. *Id.* at 274-75. And the fact that there may be innocent, alternative explanations does not otherwise undermine an agent's reasonable suspicion. *Id.* at 277-78.

Based on the purchase of the large quantities of fertilizer commonly associated with illegal marijuana grows, irrigation equipment, deer repellant and groceries, the investigating officers, relying on their training and expertise including their extensive investigation of marijuana grows in the local area, could reasonably believe defendant and others were involved in criminal activity. While each fact taken alone might not be sufficient, the combination viewed by a reasonable person with training and experience of a DEA agent, yields reasonable suspicion. Any reasonable officer would be justified in inquiring and investigating further. Using a GPS device to monitor defendant's movements on public roads is a far less intrusive method of carrying out such an investigation than similar alternatives such as agent surveillance or fly-overs both of which would provide significantly more information about the occupants of the vehicles and their activities.

The district court specifically concluded that there was reasonable suspicion prior to applying the GPS trackers in this case. (ER 9). Adopting a reasonable suspicion standard would be consistent with the Supreme Court's Fourth

Amendment jurisprudence which takes into account the level of intrusion and the nature of the privacy interest. A holding that reasonable suspicion supports the use of GPS trackers constitutes an independent basis to affirm the district court.[8]

3. Defendant Had No Reasonable Expectation of Privacy in His Open Driveway and *Jones* Does Nothing to Undermine This Conclusion.

This Court properly held that the agent's entry onto his driveway twice to install the GPS tracking devices did not violate the Fourth Amendment because defendant failed to establish a reasonable expectation of privacy in his driveway. *Jones* does not change this result.

In *Jones*, the Supreme Court addressed the installation *and* monitoring of a GPS device, and applied a trespass theory to find a seizure under the Fourth Amendment. This Court correctly applied a reasonable expectation of privacy test, not a trespass test, when it held that entry onto defendant's open driveway did not violate the Fourth Amendment.

The facts fully support the conclusion that defendant had no reasonable expectation of privacy in his driveway because it was open, unfenced, and he had taken no steps to protect it from public view or access. The "touchstone" of this inquiry is whether defendant "had a reasonable expectation of privacy" in the area.

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[8] This Court declined to comment on the district court's conclusion that the agents had reasonable suspicion. *Pineda*, 591 F.3d at 1217, n.3.

United States v. Titemore, 437 F.3d 251, 259 (9th Cir. 2006). The evidence established that a person going to the house to visit would have to go through the driveway to get to the front door. (GER 105). As this Court noted, "[i]f a neighborhood child had walked up Pineda-Moreno's driveway and crawled under his Jeep to retrieve a lost ball or runaway cat, Pineda-Moreno would have no grounds to complain." *Pineda-Moreno*, 591 F.3d at 1215. This Court's original decision should not be disturbed.

CONCLUSION

The judgment of the district court should be affirmed.

DATED this 26th day of April 2012.

Respectfully submitted,

S. AMANDA MARSHALL
United States Attorney
District of Oregon

s/ Amy E. Potter
AMY E. POTTER
Assistant United States Attorney

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the government represents that there are no related cases.

BRIEF FORMAT CERTIFICATION
Fed. R. App. P. 32(a)(5)(A) & 32(6) & Circuit Rule 32-3(3)

Pursuant to the Fed. R. App. P. 32(a)(5)(A) & 32(6) and Ninth Circuit Rule 32-3(3), and in accordance with this Court's order filed March 27, 2012, I certify that the government' supplemental brief is:

Proportionately spaced, using Times New Roman font with a typeface of 14 points, contains 4,046 words, and is no longer than 15 pages.

s/ Amy E. Potter
AMY E. POTTER
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Amy E. Potter
AMY E. POTTER
Assistant United States Attorney

08-30385

United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

– against –

JUAN PINEDA-MORENO,

Defendant-Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON
CASE NO. 1:07-CR-30036-PA-1

BRIEF OF *AMICI CURIAE*
AMERICAN CIVIL LIBERTIES UNION AND ACLU OF OREGON
SUPPORTING DEFENDANT-APPELLANT AND URGING REVERSAL

Catherine Crump
American Civil Liberties
Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

Kevin Díaz
American Civil Liberties Union
Foundation of Oregon
P.O. Box 40585
Portland, OR 97240
(503) 227-6928

David P. Gersch
Lisa Hill Fenning
Michael Levin
Arnold & Porter LLP
555 Twelfth St., NW
Washington, DC 20004
(202) 942-5000

Attorneys for Amici Curiae

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STATEMENT PURSUANT TO FRAP 29(C)(5)

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person, other than the amici curiae, contributed money that was intended to fund preparing or submitting this brief.

/s/ Lisa Hill Fenning
Lisa Hill Fenning

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), Amici Curiae the American Civil Liberties Union and ACLU of Oregon (collectively "Amici") state that they are non-profit corporations; that none of Amici has any parent corporations; and that no publicly held company owns any stock in any of Amici.

/s/ Lisa Hill Fenning
Lisa Hill Fenning

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INTEREST OF AMICI

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The American Civil Liberties Union Foundation of Oregon, Inc., is the ACLU's Oregon affiliate. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as amicus curiae, including in numerous cases involving the Fourth Amendment. In particular, the ACLU and its members have long been concerned about the impact of new technologies on the constitutional right to privacy. The ACLU filed an amicus brief in *United States v. Jones*, 132 S. Ct. 945 (2012), the decision that prompted the Supreme Court to remand this case for further consideration. It also filed an amicus brief in *In the Matter of the Application of the United States of America for Historical Cell Site Data*, Case No. 11-20884 (5th Cir. appeal docketed Dec. 14, 2011), which addressed the applicability of *Jones* to the related context of cell phone tracking.

ARGUMENT

A. A FOURTH AMENDMENT SEARCH OCCURRED

In *United States v. Jones*, 132 S. Ct. 945, 954 (2012), the Supreme Court held that a Fourth Amendment search occurred when the government placed a GPS tracking device on the defendant's car and monitored his whereabouts nonstop for 28 days. A majority of the Justices also stated that "the use of longer term GPS monitoring . . . impinges on expectations of privacy" in the location data downloaded from that tracker. *Id*. at 955 (Sotomayor, J., concurring); *see also id.* at 964 (Alito, J., concurring). As Justice Alito explained, "[s]ociety's expectation has been that law enforcement agents and others would not – and indeed, in the main, simply could not – secretly monitor and catalog every single movement of an individual's car, for a very long period." *Id.* at 964.

This case is virtually identical to *Jones* except that the search in this case was far longer. Without a warrant, the police attached a GPS tracking device to the underside of defendant's car, enabling them to follow him continuously over a four-month period. As *Jones* held, affixing a GPS monitor and then tracking a defendant's whereabouts for weeks constitutes a "search" within the meaning of the Fourth Amendment. This Court is now faced with the question left open by *Jones*: was the search reasonable despite the lack of a warrant? *Id*. at 954. This Court should hold that it was not.

B. THE WARRANTLESS GPS SURVEILLANCE OF DEFENDANT VIOLATED THE FOURTH AMENDMENT

"Ordinarily, the reasonableness of a search depends on governmental compliance with the Warrant Clause . . . ." *United States v. Kincade*, 379 F.3d 813, 822 (9th Cir. 2004) (en banc). Thus, the Supreme Court has repeatedly reminded that:

> Our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

Arizona v. Gant, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnote and internal quotations omitted)). *See also City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010) ("warrantless searches are *per se* unreasonable under the Fourth Amendment . . .") (internal quotation omitted); *United States v. Karo*, 468 U.S. 705, 717 (1984) ("Warrantless searches are presumptively unreasonable, though the Court has recognized a few limited exceptions to this general rule."); *Al Haramain Islamic Foundation, Inc. v. United States Dept. of the Treasury*, --- F.3d ----, 2012 WL 603979, at *20 (9th Cir. 2012) ("In most circumstances, searches and seizures conducted without a warrant are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions.") (internal citations and

quotations omitted); *United States v. Brunick*, 374 Fed. Appx. 714, 715 (9th Cir. 2010) (same).

The function of the warrant clause is to safeguard the rights of the innocent by preventing the state from conducting searches solely in its discretion:

> Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted.

McDonald v. United States, 335 U.S. 451, 455 (1948); *see also Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971). Illustrative of this principle is *United States v. United States District Court*, 407 U.S. 297, 315 (1972), where the Court upheld the warrant requirement against a claim that national security permitted the state to wiretap phone conversations at its own discretion. The Supreme Court rejected law enforcement's contention that the lawfulness of the search was determined only by its reasonableness: "[t]his view, however, overlooks the second clause of the Amendment. The warrant clause of the Fourth Amendment is not dead

language . . . . It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Id.* at 315 (quotations omitted).[1]

The warrant requirement is especially important here given the extraordinary intrusiveness of modern-day electronic surveillance. Without a warrant requirement, the low cost of GPS tracking and data storage, *Jones*, 132 S. Ct. at 964 (Alito, J., concurring), would permit the police to continuously track every driver. Moreover, if continuous around-the-clock tracking were permissible when a GPS device is attached to a car, it is unclear what principle would bar collection of GPS location data from a variety of other sources, such as GPS tracking of cell phones, computers and tablets with built-in GPS devices.

The exceptions to the warrant clause are few. *See*, *e.g.*, *Gant*, 556 U.S. at 335 (permitting warrantless searches of an automobile incident to arrest "when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle"); *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (holding warrantless searches at airports and entrances to courts permissible "[w]here the risk to public safety is substantial and real."); *Terry v. Ohio*, 392 U.S. 1 (1968) (holding that warrantless protective pat-downs of individuals officers encounter in the field are permissible so long as their concerns are justified by reasonable suspicion of

[1] Underscoring the importance of a neutral magistrate's review of the state's application for electronic surveillance, in that case Justice Douglas pointed to evidence that the state's unauthorized wire taps lasted six to 17 times longer than those installed under court order. *Id.* at 325 (Douglas, J., concurring).

possible danger); *Wyo. v. Houghton*, 526 U.S. 295, 300 (1999) (holding that "contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant where probable cause exists."). This case does not remotely implicate any exceptions. The search was not incident to any arrest, nor did it occur in an "exempt area" such as a border or an airport where special needs make obtaining a warrant impractical. Police had no suspicion of danger, nor could GPS tracking address that suspicion in the manner of a stop-and-frisk.

Elsewhere, the government has suggested that GPS monitoring of a car might be justified under the limited exception for warrantless automobile searches. This is wrong. "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge*, 403 U.S. at 461. At issue here is not a search of the inside (or for that matter the exterior) of a car. The continuous monitoring of the defendant for months on end was a far more invasive exercise than a one-time, one-place examination of the contents of a car. What is really important, as Justice Alito observed in *Jones*, is "the use of a GPS for the purpose of long-term tracking," not just the "attaching to the bottom of a car a small, light object that does not interfere in any way with the car's operation." *Jones*, 132 S. Ct. at 961 (Alito, J., concurring).

Indeed, the underlying justifications for the automobile exception do not apply to the "24/7" surveillance of a car. Some automobile cases stress that given the extensive regulation of automobiles, car owners have a reduced expectation of privacy. *See, e.g.*, *California v. Carney*, 471 U.S. 386, 392 (1985). But a driver's expectation that his vehicle might be inspected on discrete occasions for various regulatory purposes in no way encompasses an expectation that such momentary intrusions might entitle the state to continuously monitor his whereabouts for months on end. Moreover, the possibility that an automobile might move on before it can be searched, *Carroll v. United States*, 267 U.S. 132, 153 (1925), is entirely misplaced in the case of GPS tracking, where the essential point is that the car should move so that the state can monitor its driver's whereabouts. Of course, if there were a true exigency, the police could attach a GPS tracker absent a warrant under the existing exigent circumstances exception, *Kentucky v. King*, 131 S. Ct. 1849, 1854 (2011), but the kind of long term surveillance here is by its very nature wholly inconsistent with an exigency.

C. THE GPS SEARCH CANNOT BE JUSTIFIED BY ANY *AD HOC* BALANCING TEST

Because the search does not fit any recognized exception to the warrant requirement, the government must urge an entirely new exception to the warrant clause. The government can be expected to argue, as it did in *Jones*, that the Court should apply a "totality of the circumstances" balancing test to uphold its search as

reasonable, notwithstanding the absence of a warrant issued by a neutral magistrate. *See* Brief for United States, *United States v. Jones*, 132 S. Ct. 945 (2012) (No. 10-1259). The government's proposed test ignores the presumptive invalidity of warrantless searches discussed *supra*. In any event, no balancing tests can rescue the government's position because of the sheer and unprecedented magnitude of intrusion occasioned by the search and the relative ease in obtaining a warrant.

The government's argument in *Jones* that any privacy interest "is minimal," Brief for United States in *Jones* at 49, is wholly inconsistent with the views of the majority of Supreme Court Justices. Justice Alito emphasized the intimate nature of the information that might be collected by the GPS surveillance, including "trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on." *Jones*, 132 S. Ct. at 955 (quoting *People v. Weaver*, 12 N.Y.3d 433, 442 (N.Y. 2009)). Justice Sotomayor's concurring opinion similarly recognized the potential adverse effects of so intrusive a search:

> Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring–by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion,

> chooses to track–may alter the relationship between citizen and government in a way that is inimical to democratic society.

Jones, 132 S. Ct. at 956 (Sotomayor, J., concurring) (quotations omitted).

At the same time, the warrant requirement imposes no great burden on the state. In *Jones*, Justice Alito observed that the "police may always seek a warrant." 132 S. Ct. at 964 (Alito, J., concurring). In fact, the police obtained a warrant in *Jones*, although they did not adhere to its requirements. *Id.* at 917. Obtaining a warrant to conduct months of GPS tracking is no more burdensome for the state than the warrant required by the Supreme Court to conduct the phone wiretap in *Katz*, and the expectation of privacy attendant to placing calls on a public phone is no greater than the expectation that the state will not, absent a warrant, monitor a citizen's every movement continuously for months on end. Any balancing of the interests at stake here can only confirm the traditional understanding of the Fourth Amendment: that a warrantless search is *per se* unlawful.[2]

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[2] To the extent that the government claims it can avoid the exclusionary rule because its search was conducted in objective reliance on binding precedent, *Davis v. United States*, 131 S. Ct. 2419 (2011), that argument too is erroneous. *United States v. McIver*, 186 F.3d 1119 (9th Cir. 1999), which the government has elsewhere argued authorized GPS searches in this Circuit, is inapplicable. Unlike here, the defendant in *McIver* did "not contend that the officers infringed his Fourth Amendment rights by monitoring the beeper as [the car] traveled on the streets and highways." *Id.* at 1126. Moreover, *McIver* turned on the fact that the defendant "concede[d] that the [car] was outside the curtilage," 186 F.3d at 1126. Here, the government concedes that the Defendant's vehicle was inside the curtilage, *United States v. Pineda-Moreno*, 591 F.3d 1212, 1215 (9th Cir. 2010), and thus the search in this case could not be justified based on *McIver*.

CONCLUSION

The four month warrantless surveillance of Defendant's car violated the Fourth Amendment. The judgment of the District Court should be reversed.

Respectfully submitted,

/s/ Lisa Hill Fenning
Lisa Hill Fenning
David P. Gersch
Michael Levin
Arnold & Porter LLP
555 Twelfth Street, NW
Washington, DC 20004-1206
(202) 942-5000

Catherine Crump
American Civil Liberties
Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

Kevin Díaz
American Civil Liberties Union
Foundation of Oregon
P.O. Box 40585
Portland, OR 97240
(503) 227-6928

Attorneys for Amici Curiae

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Signature of Attorney or Unrepresented Litigant: s/ Lisa H. Fenning

("s/" plus typed name is acceptable for electronically-filed documents)

Date: April 26, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Lisa Hill Fenning
Lisa Hill Fenning

No. 08-30385

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JUAN PINEDA-MORENO,

Defendant-Appellant.

Upon Appeal from the United States District Court For the District of Oregon
Honorable OWEN M. PANNER, Senior United States District Judge
District Court No. CR 07-30036-PA

APPELLANT'S BRIEF UPON REMAND FROM SUPREME COURT

HARRISON LATTO
Attorney at Law
1631 NE Broadway, No. 533
Portland, Oregon 97232
Telephone: (503) 223-0783
E-mail: hlatto@easystreet.net

Attorney for Appellant

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APPELLANT'S BRIEF UPON REMAND FROM SUPREME COURT

The Supreme Court granted appellant's petition for a writ of certiorari, vacated the judgment of this court, and remanded to this court for further consideration in light of *United States v. Jones*, 132 S. Ct. 945 (2012). In *Jones*, the Supreme Court held that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements" constitutes a "search" within the meaning of the Fourth Amendment. *Jones*, 132 S. Ct. at 949 (footnote omitted).

That simple holding is dispositive here, and this court should reverse the trial court's order denying defendant's motion to suppress evidence, vacate the trial court's judgment, and remand to that court for further proceedings.

What happened in *Jones* was the same as what happened in this case: acting without a warrant (in *Jones*, without a valid warrant), police officers, suspecting that defendant was involved in criminal activity, surreptitiously attached a GPS monitoring device to the underside of a vehicle they knew defendant was using, and then used that device to monitor that vehicle's precise movements over an extended period of time. With the additional incriminating information that surveillance provided, police arrested defendant and then, after obtaining defendant's consent, searched his home and seized incriminating evidence. Under *Jones*, the search and the evidence it discovered were the result of police conduct

that was unlawful under the Fourth Amendment, and the evidence should have been suppressed.[1]

The remainder of this brief addresses two other arguments that defendant anticipates the Government will now assert, for the first time on remand from the Supreme Court: (1) that although its installation and use of the GPS device constituted a search, and was conducted without a search warrant, it was a "reasonable" and therefore lawful search, because it was conducted on the basis of reasonable suspicion and intruded only to a small extent upon defendant's privacy interests; and that (2) notwithstanding the unlawfulness of the search it conducted, as clarified by *Jones*, the trial court correctly denied defendant's motion to suppress evidence, because the police acted in good faith.[2] This brief

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[1] In his opening brief on appeal to this court, defendant asserted that if the attachment of the tracking device "was unlawful under the Fourth Amendment, then defendant was unlawfully stopped based on the information the acts generated, and defendant's consent to search his home, which followed his unlawful stop, was invalid and the marijuana found in defendant's home should have been suppressed." Defendant's brief also asserted, quoting from *Dunaway v. New York*, 442 U.S. 200, 210 n. 12 (1979), that the consent defendant provided while he was unlawfully detained was "tainted by the illegality and was ineffective to justify the search." (App. Br. 13). In its answering brief, the Government did not dispute those claims.

[2] The Government has graciously brought to counsel's attention the brief it has filed addressing the impact of *Jones* in another, similar case pending before this court: *United States v. Henry Villa*, No. 10-30080. The Government's brief in that case asserts both of these arguments.

first argues that, because the Government did not assert either of those arguments, either in the trial court or before this court in response to defendant's appeal, they have both been forfeited and should not be considered. It then addresses the merits of each of those arguments (which it will refer to as the "reasonable suspicion" and "good faith" arguments). It then argues briefly that, under the analysis applied in *Jones*, the panel's opinion in this case, by treating the trespass by police as trivial, erred in rejecting defendant's argument that police violated the Fourth Amendment when they entered the curtilage of defendant's home to install the tracking device, and in rejecting defendant's claim that the installation of the device constituted, by itself, a "seizure" of defendant's vehicle within the meaning of the Fourth Amendment.

A. The Government's two new arguments should not be considered.

The Government asserted its "reasonable suspicion" argument in its briefing before the Supreme Court in *Jones*. The Supreme Court responded perfunctorily, stating that it had "no occasion to consider this argument." Inasmuch as "the Government did not raise it below," so that the circuit court did not address it, the Supreme Court considered the argument "forfeited." *Jones*, 132 S. Ct at 954. In support of its determination that the argument was forfeited, the only authority the Supreme Court cited was one of its own opinions, in which the Court had stated,

without citation of supporting authority, that "[b]ecause this argument was not raised below, it is waived." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56, n. 4 (2002). Thus, the Supreme Court applied a common-law rule of appellate review, rather than any statute or rule.[3] *See also Sorrell v. IMS Health*, 131 S. Ct. 2653, 2662 (2012)(citing statement from *Sprietsma* in support of disregarding a party's "newfound" argument as coming "too late in the day."); *Rita v. United States*, 551 U.S. 338, 360 (2007) (stating that a party "did not make this argument below, and we shall not consider it").[4]

This court, in deciding whether it will consider arguments raised for the first time on appeal, had followed a much different rule, which it recently summarized as follows:

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[3] The Supreme Court did not apply its Rule 15.2, which provides that any nonjurisdictional argument not asserted in a brief in opposition "may be deemed waived." *See Baldwin v. Reese*, 541 U.S. 27, 34 (2004)(citing cases applying Rule 15.2, and distinguishing *Sprietsma* with a "cf." signal).

[4] In *Granfinanciera v. Nordberg*, 492 U.S. 33, 39 (1989), the Court stated that although it could consider grounds supporting the judgment below other than those upon which the Court of Appeals rested its decision, "where the ground presented here has not been raised below we exercise this authority 'only in exceptional cases,'" *citing Heckler v. Campbell*, 461 U.S. 458, 468-69 n. 12 (1983). It is noteworthy here that the Supreme Court in *Jones* did not find it necessary to mention this "exceptional case" basis for considering an argument not asserted in the lower court.

> [T]he rule of waiver is a discretionary one. We may consider issues not presented to the district court, although we are not required to do so. This court * * * has * * * discretion to make an exception to waiver under three circumstances: (1) in the "exceptional" case in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process, (2) when a new issue arises while appeal is pending because of a change in the law, and, (3) when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed.

Ruiz v. Affinity Logistics Corporation, 667 F.3d 1318, 1322 (9th Cir. 2012)(citations and quotation marks omitted). However, the Supreme Court's simple statement in *Jones* that an argument not asserted in a lower court is deemed "forfeited" implicitly overrules this court's different practice concerning review of claims asserted for the first time on appeal. The fact that the Supreme Court did not accompany its statement with any extended discussion or citation of authorities does not mean that it should be treated as anything less than binding precedent. Accordingly, this court should decline to address the Government's newly asserted arguments. Indeed, the Government here has doubly forfeited its new arguments, when it did not raise them either in the district court, or before this court during the initial phase of the appeal.

Although the Supreme Court's "forfeiture" rule applies equally to both of the Government's new arguments, it would be especially incongruous for this court to follow a different, more lenient practice than the one used by the Supreme

Court, when the argument the Supreme Court deemed to have been forfeited is exactly the same as one of the arguments the Government asks this court to consider. The Supreme Court has described one of the virtues of its GVR practice as being that it "alleviates the '[p]otential for unequal treatment' that is inherent in our inability to grant plenary review of all pending cases raising similar issues." *Lawrence v. Chater*, 516 U.S. 163, 166 (1996), *quoting United States v. Johnson*, 457 U.S. 537, 556 n. 16 (1982)(brackets in *Lawrence* opinion). To consider the Government's good-faith argument would treat these two similarly situated defendants differently, when the purpose of the Supreme Court's GVR order in this case was to ensure that they would be treated alike.

The Supreme Court directed this court to consider further its decision, "in light of" *Jones*. For this court to consider either of the two new arguments the Government now asserts, that it never asserted before, would not be further consideration "in light of" *Jones*; rather, this court would be considering entirely new claims, either of which might have been just as cogently asserted in the trial court, or on initial appeal to this court. The arguments do not depend upon *Jones* to any extent, and accordingly, this court should not address them.

Finally, allowing the Government to raise new arguments not asserted in the trial court would be particularly inappropriate when defendant entered a

conditional guilty plea after his motion to suppress evidence was denied. It would be unjust to affirm the conviction that followed his guilty plea when he was never given the chance to respond to, and assess the merit of other arguments the Government could have raised in opposition to his motion to suppress, but chose not to. At least, this factor weighs heavily against the exercise of any discretion this court may have to consider a waived argument.

B. Neither the "reasonable suspicion" or the "good faith" argument is sound.

If this court rejects the foregoing analysis and proceeds to entertain the Government's arguments, it should reject them on their merits.

1. The warrantless search conducted by the police in this case does not qualify for any exception to the warrant requirement.

In its first clause, the Fourth Amendment protects the right of the people against "unreasonable searches and seizures," and in its second clause, prescribes how warrants are to be issued. Although the two clauses might have been viewed independently, that is not how the Supreme Court has construed the amendment. Instead, it has described as "the most basic constitutional rule in this area" that warrantless searches "are *per se* unreasonable under the Fourth Amendment – subject only to a few specially established and well-delineated exceptions." *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971). Those exceptions

must be "carefully and jealously drawn," *Jones v. United States*, 357 U.S. 493, 499 (1958), and those seeking to establish a new exception must show that the "exigencies of the situation" make that course "imperative." *McDonald v. United States*, 335 U.S. 451, 456 (1948).

Most notably, the Supreme Court has recognized an exception for a "stop and frisk," under which a police officer, acting without a warrant but on the basis of a "reasonable suspicion" that a person has committed or is about to commit a crime, may stop the person, ask him to produce identification, and if concerned for safety, conduct a minimally intrusive "frisk" of the person's garments to determine whether he is armed. *Terry v. Ohio*, 392 U.S. 1, 20 (1968). *All* of the other exceptions noted in the Government's brief in *United States v. Villa*, however, involved situations in which the person searched already had diminished expectations of privacy caused by the special context involved. *See Samson v. California*, 547 U.S. 843 (2006)(search of parolee's home); *United States v. Flores-Montano*, 541 U.S. 149 (2004)(search of vehicle's fuel tank during border search); *United States v. Knights*, 534 U.S. 112 (2001)(probationer's home); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995)(school children); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)(same); *Maryland v. Buie*, 494 U.S. 325 (1990)(sweep of home for safety during lawful in-home arrest); *United States v.*

Place, 462 U.S. 696 (1983)(traveler's luggage); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)(border checkpoint).[5]

Terry v. Ohio is the only case that applies generally, to all persons who might be out in public. Certainly, it made our Nation a less free one; but the Supreme Court determined that the minimally intrusive nature of the search, and the exigencies of the situation, required the new rule it adopted. The Government now asks this court to recognize another generally applicable exception that would to all persons who drive cars on public roads; that is, practically everybody. By extension, the exception could apply to all persons who might be out in public on foot, for it would not present an insurmountable difficulty for police officers to find a way to get one of its miniature, lightweight GPS tracking devices into the pocket of a suspect without him knowing it.

It is no exaggeration to say that recognition of the exception the Government wants would work a drastic change in what type of Nation we will have. Americans cherish the "open" nature of our society. The Supreme Court, in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), recognized that the People of our Nation enjoy a constitutional right to do nothing, which is a right

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[5] One other case the Government cites, *New York v. Class*, 475 U.S. 106 (1986), involved a "technical" trespass into a suspect's car, consisting of an officer reaching into it through an open window to expose the VIN. Class is probably no longer good law after *Jones*.

enjoyed not only in a person's private home, but when he is out in public, where each and every citizen enjoys the right simply to loaf, 405 U.S. at 163, or to saunter about without specific aim. 405 U.S. at 164 n. 7. No longer, under the exception the Government urges this court to adopt. We would become closer to a "surveillance society," under which the Government, acting without the protection provided by a neutral magistrate, would be free to monitor the precise whereabouts of all of us. It would be constrained only by the "reasonable suspicion" standard, which is easily met. *See* Alex Kozinski and Misha Tseytlin, *"You're (Probably) a Federal Criminal*, in Timothy Lynch, ed., IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE, "THE AIMS OF THE CRIMINAL LAW" (Cato Inst. 2009).

Although the Government will paint the degree of intrusiveness of GPS surveillance as slight, given that the persons surveilled will be out in public, not all will agree. For example, this court's Chief Judge, no worse an indicator of prevailing public attitudes toward warrantless electronic surveillance by the government than any other citizen who might be selected, vociferously disagrees, comparing the practice to what might be conducted by a totalitarian government. *United States v. Pineda-Moreno*, 617 F.3d 1120, 1126 (9th Cir. 2010)(Kozinski, C.J., dissenting from denial of rehearing *en banc*).

An exception that would work such a profound change in the nature of our society should be one reserved for our Highest Court to adopt. This court should reject the Government's "reasonable suspicion" argument.

2. The police in this case did not act in good faith.

The "good faith" exception to the exclusionary rule requires courts to determine whether officers acted reasonably, albeit unlawfully, but also "requires officers to have a reasonable knowledge of what the law prohibits." *United States v. Leon*, 468 U.S. 897, 920 n. 20 (1984).

Here, the answer to the question of whether police acted lawfully was by no means provided by *United States v. Knotts*, 460 U.S. 276 (1983). *Jones* did overrule *Knotts*, but distinguished it, on the basis that it had involved no trespass to the suspect's property, where the "beeper" device had been covertly placed within the suspect's vehicle, concealed within a container police knew the suspect would purchase. *Jones*, 132 S. Ct. at 951-52. The Supreme Court based its trespass analysis upon post-*Katz* case law showing that the *Katz* "reasonable expectation of privacy test" did not supplant, but added to the Fourth Amendment's long-standing concern with trespass. Thus, the Supreme Court in *Jones* stated that "for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons,

houses, papers, and effects') it enumerates" and that the use of a different analysis in *Katz v. United States*, 389 U.S. 347 (1967), "did not repudiate that understanding." *Jones*, 132 S. Ct. at 950.

In *Jones* the Court did not purport to announce any new rule of Fourth Amendment jurisprudence, but acted on the basis of case law holding that the long-standing concern for trespass of that amendment had never been disavowed or supplanted by any new rule. Because police officers are held to a "reasonable knowledge" of what the law permits, and prohibits, the "good faith" exception to the exclusionary rule does not apply.

Moreover, even if it was only the "reasonable expectation of privacy" test that controlled, it appears that a majority of the Supreme Court Justices – those joining in the concurrence of Justice Alito, plus Justice Sotomayor – were prepared to hold that the government's warrantless use of GPS surveillance flunked that test.

In addition, the police acted after the Supreme Court issued its watershed decision in *Kyllo v. United States*, 533 U.S. 27 (2001). *Kyllo* drastically changed the analysis when police use highly sophisticated technology to enhance their perception. Before *Kyllo*, such technology had always been viewed by the Supreme Court as nothing but a boon to law enforcement, comparable to the use

by a police officer of a flashlight at night. See, *e.g.*, *Smith v. Maryland*, 442 U.S. 735 (1979)(use of pen register). In *Kyllo*, it was solely the enhancement of perception by technology, "not in general public use," that made the difference between a search, and mere observation by police from a lawful vantage point. Thus, the Supreme Court in *Kyllo* announced an entirely new rule involving perception-enhancing technology, which it referred to as "otherwise imperceptibility." This implicitly disavowed the statement in *Knotts* that "[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them[.]" *Knotts*, 460 U.S. at 282.

Moreover, Mr. Kyllo willingly sent infrared radiation from his home out into the public sphere. Police need no search warrant to observe, and arrest for public indecency a person who stands naked in his home, but in front of his picture window, because they are able to observe that electromagnetic radiation – in a different spectrum than that sent out into public by Mr. Kyllo – unaided by sophisticated equipment. *State v. Louis*, 672 P.2d 708 (Or. 1983). Because he voluntarily exposed radiation from his home to the public, the basis for the holding in *Kyllo* also undercut the statement in *Katz* that "[w]hat a person

knowingly exposes to the public" is "not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351.

C. The "trespass" analysis the Supreme Court adopted in Jones changes the result of two of defendant's arguments on appeal.

On appeal, this court rejected defendant's argument that the installation of the GPS device on the underside of his vehicle constituted, by itself, a "search" within the meaning of the Fourth Amendment. This court also rejected defendant's argument that police conducted an unlawful search by entering the curtilage of his residence without a warrant in order to attach the device. The Supreme Court's application of a "trespass" analysis in *Jones,* however, should lead this court to answer both arguments differently than it gave before.

By holding that the attachment and use of the GPS device constituted a Fourth Amendment "search," the Supreme Court in *Jones* left open the question of whether it also constituted a "seizure" of defendant's property. A "seizure" of property occurs under the Fourth Amendment when "there is some meaningful interference with an individual's possessory interest in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

After *Jones*, a technical trespass to personal property cannot be treated as trivial under the Fourth Amendment. To its function principally of transportation at the owner's convenience, the attachment, and activation of the device added a

new, and completely different one: secret surveillance of the drivers's travels in the car over a prolonged period of time. An essential aspect of ownership of property, especially an expensive one such an automobile, would seem to be the ability to control the function for which the property is used, and under the test adopted by the Supreme Court in J*acobsen*, it is not necessary for there to be some physical dispossession, before a Fourth Amendment seizure can occur

Similarly, the panel's treatment of the police officer's trespass onto the curtilage of defendant's residence as trivial, cannot be squared with *Jones*. Any trespass by police, no matter how technical, must be considered a search, when it is conducted to obtain information. For the reasons expressed in defendant's prior briefing, police also trespassed when they took a small, but significant detour from the usual route of access to the front door of defendant's residence, in order to affix the device.

D. Conclusion.

This court should remand this case to the trial court and instruct it to grant defendant's motion to suppress evidence.

Respectfully submitted,

/s/ *Harrison Latto*
HARRISON LATTO (OSB #81289)
Attorney for Appellant
Juan Pineda-Moreno

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing APPELLANT'S BRIEF UPON REMAND FROM SUPREME COURT with the Clerk of the Court for the United States Court of Appeals For the Ninth Circuit by means of its appellate CM/ECF system, on April.26, 2012. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 26th day of April, 2012.

/s/ *Harrison Latto*
HARRISON LATTO